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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-794

BARBARA SUSAN PAPISH

Petitioner,

vs.

THE BOARD OF CURATORS OF THE
UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Motion for Leave to File a Brief Amicus
Curiae on Behalf of Citizens for Decent
Literature, Inc., an Ohio Corporation,
in Support of Respondents' Petition
for Rehearing with Brief Amicus Curiae, Annexed

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Motion for Leave to File a Brief Amicus Curiae on Behalf of Citizens for Decent Literature, Inc. an Ohio Corporation, in Support of Respondents' Petition for Rehearing.

Citizens for Decent Literature, Inc., an Ohio Corporation, respectfully moves for leave to file a brief as amicus curiae in support of Respondents' Petition for Rehearing herein. The consent of the Board of Curators of the University of Missouri has been obtained, and has been filed with this Court. The consent of Irving Achtenberg, one of the attorneys for Peti-

tioner, was requested by air mail letter dated April 5, 1973.

Citizens for Decent Literature, Inc., an Ohio corporation, (hereinafter referred to by the short title "CDL") was formed for and is dedicated to the cause of decent and wholesome literature, with a view to oppose and eliminate obscene literature by cooperating with law enforcement in the enforcement of this Nation's obscenity laws. CDL believes that this Court's obscenity decisions during the past 15 years have, without reason, failed to give proper recognition to the fundamental spiritual principles and moral values upon which this Nation's obscenity laws are structured. See, for example, this Court's rulings during the past two terms of Court in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 92 S.Ct.26 (June 7, 1971)[1] reversing *People v. Cohen*, 1 Cal. App.3d 94, 81 Cal Rptr. 503, hearing denied by the California Supreme Court on Dec. 17, 1969; *Gooding v. Wilson*, 405 U.S. 229, 31 L.Ed.2d 408, 92 S.Ct.____ (Mar. 23, 1972),[2] reversing, on a writ of habeas corpus, *Wilson v. Georgia*, 223 Ga.531, 156 S.E.2d 446 ( ); *Kois v. Wisconsin*, 408 U.S. 229, 33

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[1] *Cohen* was convicted of a breach of the peace charge alleging "offensive conduct" for wearing a jacket bearing the plainly visible words "Fuck the Draft" while in the corridor of a County courthouse. This Court overruled the California Supreme Court's judgment which had rejected Cohen's contention that his conviction violated his federal constitutional right to free speech.

[2] The Georgia charge alleged that Wilson did "use to or of another and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace," where, in remarks to a police officer, who was attempting to restore access to a public building, Wilson said to one officer, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death" and to another accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you to pieces. . . ." This Court overruled the Georgia Supreme Court judgment which had rejected Wilson's claim that the Georgia breach of the peace statute had been applied to constitutionally protected speech.

L.Ed.2d 312, 92 S.Ct. _____(June 26, 1972),[3] reversing *Wisconsin v. Kois*, 188 N.W.2d 467 (June 29, 1971); *Rosenfeld v. New Jersey*, 408 U.S. 901, 33 L.Ed.2d 320, 92 S.Ct. 2479 (June 26, 1972),[4] vacating the judgment of the Superior Court of New Jersey and remanding the case for reconsideration in the light of *Cohen v. Calif., supra; Lewis v. City of New Orleans*, 408 U.S. 913, 33 L.Ed.2d 320, 92 S.Ct. 2499

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[3] *John R. Kois*, publisher of the underground newspaper, "Kaleidoscope" had been convicted for publishing obscene material, to wit, two pictures portraying the act of intercourse in a sitting position on a bed (page 17 of the May 10-23, 1960 issue); and a poem entitled "Sex Poem", describing in detail the physical and emotional impact during intercourse from the standpoint of the participating male (pages 16 and 17 of the August 9-22, 1968 issue). This Court overruled the Wisconsin Supreme Court judgment which had held both the photographs and the poem not to be constitutionally protected.

[4] *Rosenfeld* addressed a public school board meeting attended by about 150 people, approximately 40 of whom were children and 25 of whom were women. In the course of his remarks he used the adjective "Mother Fucker" on four occasions, to describe the teachers, the school board, the town and his own country. This Court overruled the New Jersey Supreme Court judgment which had denied certification of the Appellate Division's decision affirming Rosenfeld's conviction under a New Jersey statute, which provides:

> " 'Any person who utters loud and offensive or profane or indecent language in any public street or other public place, to which the public is invited . . . is a disorderly person' "

NJ Rev State § 2A: 170-29(1) (1970).

Prior to appellant's prosecution, the Supreme Court of New Jersey had limited the statute's coverage as follows

> ". . . the words must be spoken loudly, in a public place and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences." State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 583-584 (1970).

(June 26, 1972),[5] vacating the judgment of the Supreme Court of Louisiana in New Orleans v. Lewis, 257 La. 993, 244 So.2d 860 ( ), and remanding the case for reconsideration in light of *Gooding v. Wilson, supra; Brown v. Oklahoma*, 408 U.S. 914, 33 L.Ed.2d 326, 92 S.Ct._____ (June 26, 1972)[6] vacating the judgment of the Court of Criminal Appeals of Oklahoma in *Brown v. Oklahoma*, 492 P.2d 1106 (Dec. 16, 1971), and remanding the case for reconsideration in the light of *Cohen v. Calif.* and *Gooding v. Wilson, supra;* and *Cason v. City of Columbus*, ___ U.S. ___, 34 L.Ed.2d 507, ___ S.Ct. _____(Dec. 11, 1972), reversing the judgment and remanding the case to the Supreme Court of Ohio. The *Papish* decision on March 19, 1973, reversing the dismissal of Susan Papish for violating the University of Missouri's General Standard of Student Conduct (decreed by the Student Conduct Committee, affirmed by the Chancellor and Board of Curators of the University, and as to which relief had been denied by the United States District Court for the Western District of Missouri, Central Division, and by the United States Court of Appeals for the

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[5] In *Lewis*, a police officer, while in the performance of his duty, was called "God Damn Mother Fucking Police" by the defendant, Mollie Lewis. This Court overruled the Louisiana Supreme Court's judgment which affirmed her conviction for a violation of New Orleans' Ordinance 828 M.C. S49-7, which provided as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty . . . .

[6] *Brown* was convicted in the District Court of Tulsa County, Oklahoma, of a violation of 21 Oklahoma Statutes, Section 906, on an infomation which read as follows:

> ". . . that Wilbert Montell Brown . . . did unlawfully, and wilfully and knowingly, utter and speak obscene and lascivious words and language, to-wit: 'Mother-fucking fascist pig cops' and 'that black mother-fucking pig McIntosh,' in the Skap Chapel on the campus of the University of Tulsa in the City of Tulsa, Tulsa County, Oklahoma, the same being a public place and a place where numerous female persons were then and there assembled."

Eighth Circuit) continues the same erroneous line of reasoning which is common to *Cohen (supra), Gooding (supra), Kois (supra), Rosenfeld (supra), Lewis (supra), Brown (supra)* and *Cason (supra)* and undercuts the efforts of responsible educators in the schools throughout this nation to maintain a clean, wholesome educational environment in this nation's campuses, free from the corrosive force of obsenity.

Moving Party submits that Associate Justice Rehnquist's dissent is eminently correct in underscoring as manifest error, this Court's summary disposition of the case on an inadquate record. See page 5, of the slip opinion, where Justice Rehnquist states:

> ". . . I do not believe proper exercise of our jurisdiction warrants summary reversal in a case *dependent in part on assessment of the record and not squarely governed by one of our decisions.*" (Our emphasis.)

The Papish per curiam opinion and judgment is carved from an incomplete factual account which this Court has fabricated from the opinions of the District Court and Court of Appeals below. Unfortunately for this Court, the authors of the two opinions in the lower courts saw no need to emphasize the historical facts or chronology of events on the University of Missouri campus, or to justify the result reached there in terms of maintaining proper discipline and order on the Missouri Campus under the specific circumstances of Papish's prior conduct and willful defiance of reasonable regulations, clearly understood by her.[7] More succinctly, the record is

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[7]Prior to receiving a copy of the record which was before the Court of Appeals below (Appendix filed in the Court of Appeals for the 8th Circuit), Counsel for Moving Party had prepared a "Statement of Facts" from the facts appearing in the opinions of the court below. Upon examination of the record below, it became obvious that the "Statement of Facts" constructed from those opinions had to be scrapped as failing to accurately focus on the historical facts and chronology of events which faced the administrators of the University of Missouri - "gut" facts which were viscerally reacted to by the school administrators and, as a part of the record, by both of the Courts below, and formed a partial basis for the latters judgments of affirmance.

clear that, at the time Miss Papish did what she did, she knew beyond all doubt that what she was doing was in violation of the University Rules, but she willfully did it anyway. For this Court to say that, given these facts, her conduct is protected by free speech and is not subject to discipline, borders on the incredible.

Since the entire record was not before this Court, the Court lacked jurisdiction to rule on the merits. Rule 21(1) of the U.S. Supreme Court provides in part:

> "The entire record in the Court to which certiorari is addressed *shall be filed unless the parties agree that specified parts may be omitted* as unnecessary for the determination of the petition or of the writ, if it is granted."

Respondents herein *did not* enter into such an agreement. That the case was not properly before this Court is born out by Rule 21(2) which provides that:

> "Upon filing of the petition *and the certified transcript of record required by the preceding paragraph*, counsel for the petitioner shall enter his appearance and pay the docket fee." (our emphasis)

See also Supreme Court Practice, by Stern and Gressman, Fourth Edition, p 269 et seq:

> "Since the entire record is to be transmitted to the Supreme Court at the time of petitioning for certiorari, unless the parties agree to the omission of certain items, designation of items to be included in the record is no longer a limiting factor upon what the Court can consider. In the past a serious problem occasionally presented itself because of the absence from the record certified to the Supreme Court of important items in the record below. That problem should now arise even less frequently since counsel is not likely to stipulate to the omission of material upon which he will later rely should review of his case be granted. But if he finds that he did

originally agree to omit too much, or if the clerk below fails to transmit parts of the record, he can subsequently request that clerk to transmit the the omitted matter. See Sec. 6.17, infra.

The necessity for this Courts examining the certified record before ruling on the merits is reinforced by Rule 25 which states that upon the granting of the petition, "the clerk shall enter an order to that effect . . .*The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. . .*" (our emphasis).

More alarmingly, the per curiam opinions in *Papish* and *Kois, supra,* dealing with the problem of underground newspapers, have set into motion opposing forces which, under the line of reasoning developed in those decisions, this Court cannot hope to control in the future. Those summary dispositions do not begin to scratch the surface of this problem. Each member subscribing to those per curiam opinions should note with serious apprehension that the moral judgment pronounced therein is antithetical to the judgment which was arrived at four months earlier by an unanimous English Court of Appeal, dealing with a similar problem in England, in *R. v. Anderson et al.,* 3 All E.R. 1152 (Nov. 3, 4, 5,1972). See Count 3 and page 1158 of the *Anderson* opinion, a copy of which is attached hereto at Appendix A.

This Court's experiences in the motion picture area subsequent to its decision in *Jacobellisu v. Ohio,* 378 U.S. 184 (June 22, 1964) should serve as a warning that it cannot afford to embark on the course of abandon charted for the school systems by the *Papish* per curiam opinion. When, in 1962, the Ohio Supreme Court rejected the initial assault on public morals in the Ohio movies, Justice Radcliffe, speaking for the Ohio Court in *Jacobellis,* wisely applied the rule of law which holds that, "The law will rather permit a private

loss or damage than a public evil."[*] Unfortunately, this Court, after wrestling with the *Jacobellis* Appeal and that policy for two terms of Court, chose a different philosophy and a different course. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1676 (June 22, 1964). As a result of *Jacobellis, supra*, and the 1967 per curiam opinions, such as *Redrup v. New York* 386 U.S. 767, 18 L.Ed.2, 515, 875 Ct. 1414 (May 8, 1967), hard-core films like "Deep Throat," "Animal Lover," "School Girl," "Sticky Situation," and "Adultery for Fun and Profit" now engulf the Nation and continuously instruct our citizenry in their seductive lessons of human perversion. See Brief Amicus Curiae of Charles H. Keating Jr. in *Heller v. New York*, No. 71-1043, at page 7, fn.

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[*] In *Ohio v. Jacobellis*, 173 O.St. 22, 68 Ohio Ops. 2d 207, 179 N.E.2d 777 (Jan. 17, 1962), Justice Radcliffe stated at page 779:

> "There is an oft-quoted cliche to the effect that 'it is not possible to legislate in the field of morals.' The statement originally was and still should be 'it is not possible to legislate morality for the people . . . .' We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citus tolerare vult privatum damnum quam publican malum (The law will rather permit a private loss or damage than a public evil)."

7-16.[9] Whereas, in 1964, Justices Brennan and Goldberg mistakenly believed that the High Court could control the "Pandora's Box" which it was about to open, experience has taught

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[9] The avalanche of pornography on the screen began with *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (June 22, 1964) which cleared the film, "The Lovers," Except for the two scenes of explicit sexual conduct, which the State of Ohio had objected to, "The Lovers" was a totally innocuous film which could have been exhibited to juveniles, without imparting scandal. The majority of this Court in *Jacobellis* failed to note that it carried a signal to every high-brow and low-brow producer of films.

Included in The Reply of Commissioner Charles H. Keating, Jr., dated Aug. 16, 1970, to the First Draft of the Legal Panel Report of the Commission on Obscenity and Pornography at Appendix B is a 40-page continuity (scenario and photographic) on the 16mm documentary motion picture film, "A Report On The United States Supreme Court And Its Recent Decisions In Obscenity Cases" (produced in 1968), which was exhibited to the Senate in connection with the nomination of Justice Fortas. See also Hearings Before The Committee On The Judiciary, United States Senate, 90th Congress, on The Nomination of Abe Fortas to be Chief Justice, Part I, July 11, 12, 16, 17, 18, 19, 20, 22 and 23, 1968, at pages 291, 1159 and Part 2, September 13 and 16, 1968, at page 1285. After the first showing of the 16mm work print to a group of about 20 U.S. Senators on Sept. 20, 1970, one of the questions asked by the Senators in attendance was, "What was responsible for the great change in the motion picture area?" To answer that inquiry, the portion shown in Commissioner Keating's reply of Aug. 16, 1970, at Appendix B, page 10 (supra) was added, reading:

> "Justice Brennan applied what he called 'national standards' to hold the film 'The Lovers ' not obscene -- a motion picture which for the first time was allowed to depict scenes of sexual intercourse -- in this instance, in a bed and bath between the wife and a casual house guest. A jury and the State of Ohio, speaking through three of its courts and 12 of its Ohio Justices, however, had held otherwise."

A copy of the 1968 documentary film, covering the cases decided during the 1966 October Term, was lodged with the Clerk of the U. S. Court as an exhibit to the Supplementary Brief in Support of Motion to Affirm in *A Motion Picture Film Entitled "Vixen" v. Ohio*, No. 71-599. (See Supplementary Brief at page 14.) Amicus earnestly solicits the Justices not sitting at that time, to screen that film so that, in weighing this Court's "experience," they might be supplied with certain "missing links" not available in the case reports.

otherwise. To date, this Court has not yet resolved the problem of how, in 1973, it can now close the lid on the box which it opened in 1964. At this late date, we cannot afford to carry the "experiment" over into the Nation's schools.

Wisdom has many times been defined as the application of knowledge. Amicus submits that, in deciding whether the *Papish* per curiam opinion should stand, this Court should compare the opposing philosophies expressed by the Ohio Supreme Court and the United States Supreme Court in *Jacobellis, supra*, and, in contemplating the end result achieved there, reflect upon the value expressed in that portion of the statement of University of Missouri Chancellor John W. Schwada in the trial court below. (See Statement of Facts, infra, at pages 22-25) reading:

> "The University has a vital educational interest in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues, and it is expected and generally believed that the educational community possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within the University communities asserts that learning is not

limited to the classroom alone, but takes place through the campus. If this proposition, supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy."

In Moving Party's view, this Nation is facing a moral crisis of destructive proportions, which requires this Court to examine closely the testimony of Chancellor *Schwada* and Dean of Students *Jack Matthews* in the record below. That this Court should reject their sound reasoning without even reading their testimony, speaks poorly of this Court's regard for the appellate processes and the interest of the citizens of Missouri and other sovereign states in the moral environment their offspring are exposed to in state supported schools.[10] A comparison with the English Court's ruling in *Anderson, supra,* provides ample support for the assessment that this Court's summary rulings in *Kois, supra,* and *Papish, supra,* represent misjudgments of monumental magnitude. At the very least, those decisions deserve reconsideration by way of full briefing and argument on the merits, in order that the membership of this Court may be made aware of what is occurring on this Nation's campuses and elsewhere, under the guise of free speech.

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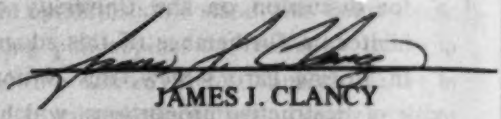
[10] This Court's reversal of those judgments is manifest error. Moving Party submits that if a majority of this Court, after examining the chronological account of the historical facts, including the statements of Chancellor Schwada and Dean of Students Matthews, as recited in the Brief herein, at pages 21 - 25, does not see fit to revise its judgment, then surely it is not unreasonable to conclude that those justices have failed to observe the "Good Behavior" required of all federal judges by Art. III, Sect. 1 of the Federal Constitution.

It is respectfully requested that the applicant herein be granted leave to file a brief amicus curiae in support of Respondents' petition for rehearing, setting forth arguments on the above and related issues and why further briefing and and argument should be had on the cause herein.

DATED: April 13, 1973.



JAMES J. CLANCY
Counsel for CDL.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-794

[redacted] SUSAN PARISH,

Petitioner,

vs.

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Political Cures of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing

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STATEMENT OF THE CASE

Academic History of Miss Parish

Barbara Susan Parish, the petitioner in the federal courts, [redacted] pursued a 1958 academic degree from the University [redacted] at the time she was admitted to graduate

[redacted] as the record in the Court of Appeals are designated herein as [redacted]